**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
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| Implementation of the Local Competition | ) | |
| Provisions of the Telecommunications Act of 1996 | ) | |
| | ) | CC Docket No. 96-98 |
| Joint Petition of BellSouth, SBC, and Verizon for | ) | |
| Elimination of Mandatory Unbundling of High- | ) | |
| Capacity Loops and Dedicated Transport | ) | |
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# COMMENTS OF XO COMMUNICATIONS, INC.


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**COMMENTS OF XO COMMUNICATIONS, INC.**

Pursuant to the Commission's Public Notice seeking comment on the Joint Petition ("Joint Petition") of BellSouth Corporation and SBC Communications, Inc., and Verizon Telephone Companies ("Verizon") (collectively, "Joint Petitioners") filed on April 5, 2001, XO Communications, Inc. ("XO") files these comments.[1]

## I. EXECUTIVE SUMMARY

XO urges the Commission to dismiss the Bell Operating Company ("BOC") Joint Petition that essentially seeks reconsideration of the FCC's decision to require incumbent local exchange carriers ("ILECs") to provide high-capacity loops and dedicated transport as mandatory unbundled network elements ("UNEs") under Section 251 (c)(3) of the Communications Act.

Nothing has changed since the FCC's recent issuance of the *UNE Remand Order*[2] to justify altering the decision that high capacity loops and dedicated transport meet the statutory

[1] *Pleading Cycle Established for Comments on Joint Petition of BellSouth, SBC, and Verizon*, Public Notice, DA 01-911 (Apr. 10, 2001); *Common Carrier Bureau Grants Motion for Extension of Time for Filing Comments and Reply Comments on BOC Joint Motion Regarding Unbundled Network Elements*, CC Docket No.96-98, Public Notice, DA 01-1041 (Apr. 23, 2001).

[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*"UNE Remand Order").*

standard for mandatory unbundling. The Joint Petition regurgitates the same BOC arguments that the FCC previously and properly rejected in the *UNE Remand Order*. Moreover, the Joint Petition fails to provide any factual predicate upon which to reverse the Commission's pro-competitive unbundling policies.

The Commission must also deny the Joint Petition because it is procedurally defective. As a procedural matter, the Joint Petition violates the FCC's three-year quiet period and contravenes the Commission's rules governing requests for reconsideration, review, and repeal of existing rules.

In support of its Petition, the BOCs, once again, roll out their well-worn and incorrect argument that continued access to unbundled high-capacity loops and unbundled dedicated transport will stifle innovation and deter investment in broadband facilities. The historical record, however, is clear that increased competition, not ILEC central planning, is the main engine of innovation and increased investment in telecommunications services and facilities.

Nor should the Commission give any weight to BOC arguments in the "Fact Report"[3] appended to the Joint Petition. At best, the "Fact Report" provides an inaccurate misrepresentation of incomplete and distorted data. As outlined in XO's comments, the data cited in the "Fact Report" are distorted, incorrect and, fail to recognize the impact of the recent economic downturn in the telecommunications sector.

Finally, the Joint Petition is premature given the BOCs on-going failure to comply with existing service quality obligations and merger conditions. Granting the relief sought in the Joint

[3] *See Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport,* submitted by the United States Telecom Association, Prepared for BellSouth, SBC, Qwest, and Verizon *(*April 5, 2001) ("Fact Report").

Petition would allow the BOCs to evade their basic unbundling obligations and would provide them with yet another opportunity to unjustly gain another competitive advantage in the local exchange market. For the reasons listed below, XO respectfully requests that the FCC deny the Joint Petition.

## II. THE *UNE REMAND ORDER* CORRECTLY DETERMINED THAT HIGH-CAPACITY LOOPS AND DEDICATED TRANSPORT MEET THE STATUTORY STANDARD FOR MANDATORY UNBUNDLING

The Commission correctly held in the *UNE Remand Order*:

> [R]equesting carriers are impaired without access to loops, and . . . *loops include high-capacity lines*, dark fiber, line conditioning, and certain inside wire. Requiring carriers to obtain loops from alternative sources would *materially raise entry costs, delay broad-based entry, and limit the scope and timeliness of the competitor's service offering*.[4]

The Commission further correctly reaffirmed in the *UNE Remand Order* "that the definition of dedicated transport set forth in the *Local Competition First Report and Order* includes all technically feasible capacity-related services such as DS1-DS3 and OC3-OC96 dedicated transport services," and "unbundling high-capacity dedicated transport offerings will encourage competition and facilitate the deployment of advanced services."[5] In addition, the Commission modified the definition of "dedicated transport" to include dark fiber.[6]

Absolutely nothing has changed since the Commission's issuance of the *UNE Remand Order* that would justify re-examination of its conclusion that ILECs must provide, among other

[4] *UNE Remand Order*, at para. 165 (emphasis added) (noting also that "neither self-provisioning loops nor obtaining loops from third-party sources is a sufficient substitute that would justify excluding loops from an incumbent LEC's unbundling obligation under section 251(c)(3)").

[5] *UNE Remand Order* at para. 323.

[6] *UNE Remand Order*, at para. 325.

things, high-capacity loops and dedicated transport as mandatory unbundled network elements under Section 251(c)(3) of the Communications Act, as amended by the Telecommunications Act of 1996 ("Act"). The Joint Petition raises the same arguments that the Commission previously and properly rejected in the *UNE Remand Order* just about 18 months ago. Specifically, the Commission correctly rejected in the *UNE Remand Order* the ILEC arguments that high-capacity loops should be excluded from the definition of a loop, and found that high-capacity loops "retain the essential characteristic of the loop."[7] The Commission further correctly dismissed incumbents' assertions that high-capacity loops need not be unbundled simply because some competitive local exchange carriers ("CLECs") have successfully self-provisioned loops to large business customers. The Commission observed that "[b]uilding out any loop is expensive and time-consuming, *regardless of its capacity*," and that even if CLECs are self-provisioning to large business customers, this demonstrates "nothing about the customer the competitor would like to serve but cannot because the cost of building a loop from the customer premises to the competitive LEC's switch is prohibitive."[8] Further, the Commission rejected ILEC assertions that competitive alternatives exist for dedicated transport, noting that "despite the evidence of some competitively deployed interoffice transmission facilities, lack of access to the incumbent's dedicated transmission facilities impairs a requesting carrier's ability to provide the services it seeks to offer."[9]

If anything, the Commission's reasoning in the *UNE Remand Order* holds even more true today. The importance of providing broadband services to the local market has not diminished

[7] *UNE Remand Order* at para. 176.

[8] *UNE Remand Order* at para. 184.

[9] *UNE Remand Order* at para. 340.

within the past year, and in fact, the only significant changed circumstance over the past year is that while competition in the local market has dropped off, the demand for high-capacity services has increased to the extent that high-capacity loops are now the facility of choice. In fact, the dearth of competition in the local market combined with increased demand for high-capacity services has led to higher rates for high-capacity services.[10]

Moreover, demand for high-speed services has filtered down to all segments of the local exchange market so that CLECs require unbundled access to high-capacity loops in order to effectively compete for even small business customers. Contrary to the Joint Petition's assertion that high capacity services are provided primarily to large businesses, a considerable portion of small business customers now seek DS-1 loops or higher.[11] As the Commission also noted, depriving CLECs access to unbundled dedicated transport would force CLECs "to create a patchwork of alternative network facilities, where they have been deployed and are being offered to other carriers, or alternatively to construct their own transport facilities."[12] Facilities-based CLECs would be significantly impaired in their ability to compete in the local exchange market to provide service to *all* customers if they did not have access to these unbundled elements. As the Commission concluded in the *UNE Remand Order*, CLECs require the ability to compete

[10] *See Bills for Phones and Cable TV Rise, Reflecting a Dearth of Competition*, Wall Street Journal, (May 3, 2001); *Broadband Net Rates Continue to Climb*, CNET.com article (May 4, 2001) (noting that Verizon and BellSouth have raised internet access rates in recent months).

[11] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of Hihg-Capacity Loops and Dedicated Transport*, CC Docket No.96-98, Comments of XO Communications (June 11, 2001), Attached Declaration of Bryan Burns in Support of Comments of XO Communications ("XO Declaration"), at para. 3.

[12] *UNE Remand Order*, at para. 341.

equally with ILECs in these niche markets and "access to these high-capacity lines is necessary for ubiquitous deployment of high-speed services, including high-speed Internet access."[13]

## III. THE BOC JOINT PETITION SHOULD BE DISMISSED FOR PROCEDURAL DEFECTS

### A. The *UNE Remand Order* Established a Bright Line Rule for Tri-Annual Review of the FCC's UNE Rules

As NewSouth's motion to dismiss the Joint Petition demonstrates,[14] the Joint Petition violates the Commission's three-year quiet period and does not follow the Commission's rules governing requests for a repeal of existing rules. For these reasons alone, the Commission should dismiss the Joint Petition immediately without further consideration. The Commission must be cognizant of the important market stabilizing effects associated with its decision to periodically review the unbundling list. Should it now decide to reverse course midstream, the Commission will jeopardize certain fundamental assumptions supporting CLEC business plans and relied upon by their investors.

Specifically, the three-year quiet period was established to allow new CLEC entrants "to design networks, attract investment capital, and have sufficient time to attempt to implement their business plans," and to promote stability, market certainty and administrative ease.[15] The Commission correctly recognized in the *UNE Remand Order* that it would be "inconsistent with our overall policy goals to consider petitions to remove elements from the national list

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[13] *UNE Remand Order* at para. 187.

[14] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport*, CC Docket No. 96-98, Motion to Dismiss Joint Petition of NewSouth Communications (Apr. 25, 2001) ("NewSouth Motion to Dismiss").

[15] *UNE Remand Order* at para. 150.

immediately upon adoption of this order" but the BOCs' Joint Petition now requests that the Commission do exactly that —*only one year* after the Commission's rules on high-capacity loops and dedicated transport became effective.[16] As the Commission recognized, new CLECs require time to incorporate these requirements into their business plans. Given that only approximately one year has passed since the effective date of the *UNE Remand Order*, the Commission should not allow BOCs to frustrate the goals of stability and market certainty by violating this three-year quiet period. Indeed, instead of attempting to comply with the Commission's requirements in the *UNE Remand Order*, the BOCs now seek to evade compliance by overturning the Commission's determinations. In addition, the BOCs force CLECs to expend limited resources opposing Joint Petitioners' unwarranted attempts to remove from the unbundling list elements necessary for the CLECs to compete rather than investing such resources in bringing competitive choices to consumers.

Not only is an attempt to remove elements from the UNE list in clear violation of the Commission's three-year quiet period, but economic and industry conditions strongly support rejection of the Joint Petition. Since issuance of the *UNE Remand Order*, the marketplace and prospects for local competition have dramatically *darkened*, not brightened as erroneously described in the BOC Joint Petition's "Fact Report." Furthermore, in light of the growing number of CLEC bankruptcies and re-organizations, it will be difficult (and ill-advised) for the Commission to engage in the type of "spot-check" analysis that the Joint Petition seems to advocate. Such an approach would be contrary to the public interest because it would invite

[16] *See UNE Remand Order* at para. 150. The *UNE Remand Order* was published in the Federal Register on January 18, 2000. Among other rules, the requirement for providing the high-capacity loop UNE became effective on February 17, 2000 and the requirement regarding dark fiber transport UNE became effective May 18, 2000.

additional petitions on an *ad hoc* basis from all segments of the industry and potentially lead to the filing of numerous and varied UNE Petition requests that would make the burdens of the Section 271 process appear trivial in comparison.

### B. Other Procedural Reasons to Dismiss the Joint Petition

Besides the fact that the Joint Petition violates the three-year quiet period established in the *UNE Remand Order*, the Joint Petition is also procedurally defective because it essentially seeks reconsideration, review, and repeal of the Commission's rules in the *UNE Remand Order*.

This attempt to seek reconsideration of actions taken in the *UNE Remand Order* is flagrantly untimely. Section 1.429(d) of the Commission's rules requires that any petition for reconsideration of a final action be made within 30 days from the date of public notice of the action, as defined in Section 1.4(b) of the Commission's rules.[17] The *UNE Remand Order* was published in the Federal Register on January 18, 2000. The Joint Petition was filed a year later on April 5, 2001. A petition seeking reconsideration of the Commission's actions *one year after the fact* should clearly be dismissed as in violation of Section 1.429(d) of the Commission's rules.

The Joint Petition also fails to meet the Commission's requirements in section 1.401 of its rules providing that "any interested party may petition the Commission for the issuance, amendment or repeal of a rule or regulation."[18] In such circumstances, the Commission must issue a Notice of Proposed Rulemaking ("NPRM"), publish the NPRM in the Federal Register, and establish an appropriate comment period. The Joint Petition ignores these procedural

[17] 47 C.F.R. § 1.429(d). Section 1.4(b) provides that the date of public notice of a rulemaking document occurs on the date of the Federal Register publication date. 47 C.F.R. § 1.4(b).

[18] 47 C.F.R. § 1.401(a).

requirements and instead seeks Commission action on its petition without release of a notice of proposed rulemaking. Nor is the Joint Petition styled as a waiver of the Commission's rules for good cause shown.[19] As a procedural matter, the Joint Petition therefore must be rejected.

## IV. THE BOCS FALSELY CLAIM THAT CONTINUING TO REQUIRE ACCESS TO UNBUNDLED HIGH-CAPACITY LOOPS AND UNBUNDLED DEDICATED TRANSPORT WILL DETER FACILITIES-BASED COMPETITION, INNOVATION AND INVESTMENT IN BROADBAND FACILITIES

Trotting out one of their most hackneyed arguments, the BOCs assert that continued access to unbundled high-capacity loops and unbundled dedicated transport will stifle innovation and deter investment in broadband facilities.[20] The BOCs unsuccessfully proffered this same argument when they submitted their Section 706 forbearance petitions in early 1998.[21] At that time, the BOCs argued that CLEC access to ILEC equipment and services for the provision of advanced services would stall ILEC deployment of such services. As a result of the Commission's decision to disregard the entreaties of the BOCs and enforce the Act as it was intended, provisioning of DSL services has flourished – even if pure-play DSL providers have recently met very difficult times on Wall Street.

Once again, the BOCs provide a veiled threat to hold hostage the broadband market if their demands are not met. In fact, however, granting the Joint Petition will impede the CLECs'

[19] 47 C.F.R. § 1.3.

[20] Joint Petition at 29-32.

[21] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, *et al.*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998) (*Advanced Services Order and NPRM*), *remanded U S WEST Communications, Inc. v. FCC*, No. 98-1410 (D.C. Cir. Aug. 25, 1999) (granting the Commission's motion for remand), *on remand* 15 FCC Rcd 385 (1999) (*Advanced Services Remand Order*, *appeals pending sub nom. MCI WorldCom, et al. v. FCC*, Nos. 00-1002, *et al.* (D.C. Cir. filed Jan. 3, 2000) (addressing Section 706 forbearance petitions from BOCs).

ability to compete and reduce competitive pressure on the ILECs to deploy broadband and advanced services. For instance, while ILECs had the capability to offer DSL services for many years, they elected to stall the deployment of those services in order to avoid cannibalizing their more profitable ISDN services. It was only when new entrants began to deploy DSL services that the BOCs quickly responded with their own DSL offerings. The historical record is replete with other examples of RBOC broken promises regarding the deployment of innovative services and technology. For example, in the mid 1990's, many RBOCs assured the public that they would compete against the incumbent cable monopolists in the provision of video services through the deployment of video dial tone ("VDT"). As of this date, however, they have yet to deploy VDT in any manner worth noting.[22] The Commission should not allow the ILECs to claim that they will not upgrade their facilities or deploy new broadband facilities if the UNE rules are not amended.[23]

The notion that ILECs will not have incentives to build or offer broadband services is particularly ludicrous in light of the fact that ILECs have a stronghold on the DSL market. At the close of fourth quarter 2000, of the total 2,429,189 DSL lines in service, Qwest, SBC, BellSouth and Verizon provided DSL service to 1,899,271 of those lines, representing over 78

[22] Other examples of BOC promises that have been made but not met include the promise to deploy rapidly ISDN services. Further, even where the FCC has encouraged BOCs to enter the out-of-region long distance market, BOCs have largely failed to enter this market. *See, e.g. Bell Operating Company Provision of Out-of-Region Interstate, Interexchange, Services*, FCC 96-288, CC Docket No. 96-21, Report and Order, 11 FCC Rcd 18564 (rel. Feb. 14, 1996).

[23] For example, according to its own press release, Verizon "has invested $10 billion in the last 6 years in its New York network to meet exploding demand for phone service, data communications and other high-tech services." Verizon cited the investment to justify its proposed regulatory plan for New York, under which Verizon would increase basic phone rates by $1.25 per month.. Further, Verizon notes that, in New York alone, its "network features more than a million miles of fiber-optic cable." *See* Verizon Communications Press Release, "Verizon Proposes New Regulatory Plan for New York," May 15, 2001.

percent of the total DSL lines provided.[24] Not happy with a nearly 80 percent market share, the BOCs seek Commission sanctioned deregulation and the ability to monopolize the remaining 20 percent.

Further, Verizon, SBC and BellSouth recently raised their DSL prices to $49.95 per month for the base DSL subscriber rate. The price increase – about 25 percent – was introduced despite SBC's claims that its costs of signing up new subscribers have fallen by more than 25 percent.[25] In addition, the price of DSL equipment continues to fall; yet the BOCs appear set on raising their DSL rates.[26] All of these moves come in the wake of the demise (or predicted demise) of significant players in the DSL arena – e.g., NorthPoint, Rhythms, and Covad. Any slowdown by the ILECs in their deployment of broadband services is simply an attempt to manipulate the availability and price for those services as competitive providers disappear. Contrary to the position of the BOCs, the solution to preventing further slowdown is to increase competition by allowing new entrants continued access to the tools necessary to provide broadband services, such as high capacity loop and transport UNEs.

Moreover, belying the claims of the BOCs, SBC continues to upgrade its network through its "Project Pronto."[27] In developing and implementing Project Pronto, SBC has

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[24] ALTS Report at 33.

[25] *SBC's Whitacre says DSL prices will fall,* Reuters (May 16, 2001), http:biz.yahoo.com/rf/010516/n16441190_2.html (CEOWhitacre noting that SBC *will raise prices* for DSL 25 percent); *see Broadband Net rates continue to climb,* CNET News.com (May 4, 2001) (noting that SBC has stated that costs of signing up new subscribers has fallen by more than 25 percent over the past six months, along with the price of DSL equipment).

[26] *Broadband Net rates continue to climb,* CNET News.com (May 4, 2001).

[27] *See* SBC Press Release "SBC Begins New Phase of Project Pronto, Bringing Fiber Access to Small Businesses and Potentially to Homes to Support New Broadband Services" (May 9, 2001).

publicly touted what it now wants the Commission to ignore: access to high-capacity fiber provides consumers with "more reliable, expandable service…more efficiently."[28]

## V. THE BOCS' "FACT REPORT" IS NEITHER FACTUAL NOR NOTEWORTHY

In addition to its manifest procedural defects, the Joint Petition is also devoid of any factual predicate on which the Commission could base a decision to amend the list of mandatory UNEs. The Joint Petition was based entirely on a so-called "Fact Report" prepared by the United States Telecom Association ("USTA") for the BOCs. With respect to the "factual" aspects of the BOCs' claims, the BOCs' appended "Fact Report" is no more than a compilation of incomplete and distorted data, based, in part, on a proprietary study containing significant errors.[29] AT&T and other commenters have persuasively shown that the BOC "fact" report is utterly unreliable and can be given no weight.[30] This data thus provides no basis for reversing the Commission's sound UNE unbundling policy.

The Joint Petition is simply wrong in asserting that high-capacity loops from non-incumbent providers are ubiquitously available.[31] First, there is no readily available source of high-capacity loops from third-party sources, contrary to the Joint Petition's assertions.[32] As discussed in its Declaration, XO is unaware of any meaningful source for high capacity loops

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[28] SBC Press Release "SBC Begins New Phase of Project Pronto, Bringing Fiber Access to Small Businesses and Potentially to Homes to Support New Broadband Services" (May 9, 2001).

[29] *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, Reply Comments of AT&T Corp. on Use of Unbundled Network Elements to Provide Exchange Access Service (April 30, 2001) ("AT&T Reply Comments") at 17 (noting that the proprietary study by the New Paradigm Resources Group contains "severe computational errors or provide statistics that do not reliably demonstrate the extent to which high capacity loops and transport are available outside incumbent networks").

[30] *See, e.g.*, AT&T Reply Comments.

[31] Joint Petition at 8-29.

[32] XO Declaration at para. 5.

from alternative providers. While some CLECs, including XO, have fiber rings in large metropolitan areas, these rings do not extend to each end-user's premises and therefore do not provide the critical "last mile."[33] Accordingly, in order to provide service to a particular customer, each CLEC is often faced with the choice of either building to that location or buying or leasing facilities. Finally, to the extent that other alternative providers may have local fiber facilities available for purchase, this fiber is often located along the same routes as other CLECs or competitive providers such as XO, thus providing few alternative sources for high capacity loops or transport.[34] For example, while the "Fact Report" cites Northeast Optic Network ("NEON") as a wholesale fiber supplier in Washington D.C., the "Fact Report" neglects to mention that the NEON fiber ring only extends about 22 blocks throughout the Washington D.C. market, which provides much less coverage of the Washington D.C. metropolitan area than XO serves.[35] To the extent that there may be some competitive alternatives, these alternatives exist only along limited routes for dedicated transport and are virtually non-existent for high-capacity loops. Ultimately, there is no basis for the Joint Petition's contention that there is a ubiquitous supply of non-ILEC alternatives for obtaining these network elements.

### A. The Numbers Cited in the "Fact Report" Are Distorted, Incorrect And, Fail to Consider the Recent Economic Downturn

As many parties have noted in the Commission's proceeding addressing the use of UNEs to provide exchange access services, the USTA "Fact Report," recycled by the RBOCs to support their positions in the instant Petition, misstates and mischaracterizes nearly every "fact"

[33] XO Declaration at para. 5.

[34] Because many municipalities or local agencies require joint construction in a single trench, often CLECs and wholesale fiber providers ultimately end up installing fiber along the same routes. XO Declaration at para. 11.

that it attempts to recite.[36] For example, the market share information reflects a hodgepodge of inaccurate data further twisted by the BOCs to demonstrate a conclusion that best benefits their cause;[37] the figures representing CLEC fiber miles is further inflated and distorted; and the "Fact Report" in general fails to incorporate or acknowledge the recent economic conditions in the industry.

In contrast to the "Fact Report"'s assertions that CLECs have a 36 percent market share of the special access market, the Commission's own data consistently shows that CLECs had at the very most a 21.8 percent market share in 2000, or only a 2.1 percent increase over 1999.[38] This figure does not accurately reflect CLEC market entry for "facilities-based" services and therefore, does not provide a true picture of whether a CLEC would be impaired without access to unbundled high-capacity loops and dedicated transport.[39] This figure, for example, includes resale services, which should not be part of the impairment analysis for facilities-based competition; high resale revenues in fact demonstrates that there are few options to ILEC facilities.[40]

By double-counting, inflating, and distorting facts, the "Fact Report" grossly exaggerates every measure of the competitive alternatives to BOC loop and transport facilities that it purports to present. The fiber deployment data in the "Fact Report" is grossly distorted. First, the petition and "Fact Report" rely on numbers that the BOCs admit are incorrect. A small footnote in Table

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[35] XO Declaration at para. 11.

[36] *See, e.g.*, AT&T Reply Comments at 2.

[37] *See* AT&T Reply Comments at 17-18.

[38] AT&T Reply Comments at 17-19.

[39] *Id*. at 19.

[40] *Id*.

3 of the "Fact Report" states that the underlying data regarding CLEC fiber miles and revenues were incorrect.[41] For instance, the revised percentage increase in CLEC fiber miles would decrease from a BOC-reported 35 percent to below 14 percent. Moreover, the rate is bound to decline in light of the recent downward pressures on the financial markets and the growing number of CLEC bankruptcies. Although the "Fact Report" notes the discrepancy, the overarching arguments and reported information in the Petition are all based on the incorrect numbers.

The BOCs further fail to support their claims that CLECs have access to over 200,000 route miles of non-ILEC fiber that may act as a substitute for ILEC loop and transport UNEs. Moreover, the "Fact Report" overstates overall fiber deployment because in counting the fiber deployment, it does not distinguish between projects in which multiple CLECs are joint owners and projects in which CLECs lease capacity from other CLECs. Accordingly, a substantial portion of the fiber that is reported in these figures is double or triple-counted.[42] Moreover, as noted by AT&T, fiber must be in the right location for it to be valuable; the tabulation of fiber miles in itself is meaningless.[43] For example, loops terminate in an ILEC's local serving office ("LSO"), and thus, the CLEC must actually build into the LSO or must rely on the ILEC in order to serve the end-user customer. The "Fact Report" is also blatantly wrong in other instances.

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[41] When the revised numbers are considered, the growth in CLEC fiber miles and revenues between 1999 and 2000 is unremarkable. For example, Table 3 of the Fact Report provides that 1999 CLEC fiber miles number are 161,617, and that fiber miles increased to 218,445, but in actuality as reflected by a footnote in the table, in 1999, the fiber miles were 191,872 and thus, the increase was much less dramatic than portrayed by the BOCs.

[42] AT&T Reply Comments at 20. *See* XO Declaration at para. 11. In some cases, where fiber is located in a city, the fiber is located along the same routes as other carrier's rings or routes and thus, does not adequately reflect the actual diversity of fiber options available.

[43] AT&T Reply Comments at 21.

Table 6 of the "Fact Report" shows cities where wholesale local fiber is available, listing "American Fiber Systems" as having fiber networks in 56 cities.[44] In reality, this company has completed construction of a segment of its network in only one city, Cleveland.[45]

In addition, the "Fact Report" confuses long-haul inter-city fiber with local fiber in calculating figures of fiber miles.[46] Such long-haul fiber is not a proper substitute for ILEC local facilities that CLECs must use to provide local and special access services. First, the marketplace for inter-city long haul fiber services is more competitive than the local counterpart. Second, long-haul, inter-city fiber cannot be considered a substitute for ILEC local facilities that CLECs use to provide local and special access services. The actual portion of local fiber that has been deployed by CLECs has been much more modest than the aggregate fiber figures cited by the BOCs.[47]

Moreover, even assuming *arguendo* that the BOCs' estimate of 218,000 CLEC fiber miles is an accurate number, that amount of fiber is tiny relative to the fiber deployed by the ILECs. Indeed, Verizon's fiber network in New York alone is more than five times the total amount of CLEC fiber in the entire country.[48] Similarly, as early as 1998, BellSouth's fiber

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[44] XO Declaration at para.8.

[45] XO Declaration at para. 8; *see also* http://www.americanfibersystems.com/about.html.

[46] *See* AT&T Reply Comments at 20 (noting that the NPRG Table relied upon by USTA includes long haul fiber and are not adequate substitutes for ILEC local facilities that CLECs must use to provide local and special access services).

[47] *See* AT&T Reply Comments at 20 (noting that only 30 percent of Winstar's fiber deployment is local fiber, only half of Adelphia's fiber is local, and none of Level 3's fiber appears to be local).

[48] A Verizon press release touts the fact that, in New York alone, Verizon's "network features more than a million miles of fiber-optic cable." *See* Verizon Communications Press Release, "Verizon Proposes New Regulatory Plan for New York," May 15, 2001.

optic cable routes exceeded 2.5 million miles.[49] Those numbers have certainly increased for BellSouth in three years. In Tennessee alone, BellSouth had deployed a total of 363,000 miles of fiber optic cable as of March 6, 2000.[50]

The BOCs argue that circumstances concerning high-capacity loops and transport have changed dramatically in just one year[51] and assert that there has been vigorous growth in the CLEC industry, but fail to acknowledge the actual recent marketplace developments affecting the CLEC industry. For instance, the market capitalization changes for CLECs between 1999 and 2000 demonstrates the state of competition in the telecommunications market.[52] Of the 36 public CLECs doing business in that one-year period, only one CLEC saw a positive 52-week change.[53] The remaining 35 CLECs saw downward 52-week market capitalization changes, and 26 of those CLECs saw market capitalization decreases of 75 percent or more.[54] Statistics from the FCC further reflect that while local competition increased from 1999 to 2000, the actual portion of the local market served by CLECs as of December 2000 was not significant by any measure. For example, CLECs provided service to 8.5% of total end-user lines at the end of 2000.[55] The figures in the "Fact Report" are thus most likely an inflated representation of actual, current CLEC market share.

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[49] *See* BellSouth Press Release, "BellSouth Celebrates 15 Years of Growth and Success (Dec. 31, 1983 – Sept. 30, 1998)."

[50] BellSouth Press Release, "BellSouth Tops in Fiber Optic Deployment," March 6, 2000.

[51] Joint Petition at 32.

[52] ALTS 2001 Competition Report ("ALTS Report") (February 20, 2001) at 22.

[53] ALTS Report (General Communications of Alaska saw a positive 52-week market cap change of 16.1 percent).

[54] ALTS Report.

[55] FCC Local Competition Status Report as of December 31, 2000.

Unfortunately, many of the competitive carriers on which the BOCs rely to demonstrate competition in the telecommunications marketplace are no longer viable entities. Even among those companies that have not filed for bankruptcy protection are a number that face a nearly impossible task to obtain funding in order to stay afloat.[56] The list of CLECs that have recently encountered financial troubles or entered into bankruptcies has become increasingly lengthy, and such list overwhelmingly demonstrates that local competition is in a precarious state.[57]

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[56] For example, in its quarterly report filed with the Securities and Exchange Commission, Rhythms announced its poor condition: "Recently, the financial markets have experienced extreme price fluctuations. The ongoing market downturn and continuing general market uncertainty, as well as the recent decline in the DSL industry, are adversely affecting the Company's ability to secure additional financing….If the Company is unable to obtain additional capital (or vendor financing) or is required to obtain it on terms less satisfactory than what the Company desires, the Company will need to further limit its network services or take other actions that could adversely affect its business operations." Rhythms Quarterly Report (SEC Form 10-Q).

[57] *See, e.g.*, **e.spire**—http://www.espire.com/Corp_Info/index.cfm—("On March 22, 2001, e.spire announced that it had filed for voluntary reorganization under Chapter 11 of the U.S. Bankruptcy code in Wilmington, Delaware."); **Teligent—**http://dailynews.yahoo.com/h/ap/20010521/tc/teligent_bankruptcy_1.html—("Teligent Files for Chapter 11," Matthew Barakat, AP Newswire ("Teligent Inc., unable to obtain $350 million in financing it needed to stay afloat, filed [in New York on May 21, 2001] for Chapter 11 bankruptcy protection from its creditors."); **Network Access Solutions**—http://public.wsj.com/sn/y/SB989597568525621869.html ("Network Access Announces Plans to Eliminate 150 Jobs," Dow Jones Newswire (May 11, 2001)); **Winstar**—http://biz.yahoo.com/bw/010418/2175.html—"Winstar Files Voluntary Chapter 11 Petition," (April 18, 2001); **BroadBand Office**—http://www.bbo.com—"BBO Files for Chapter 11 Bankruptcy Protection," ("On May 9, 2001, BroadBand Office, Inc. filed for Chapter 11 protection in the US District Court for the District of Delaware.")]; ICG Communications—http://news.cnet.com/news/0-1004-202-3681414.html – *ICG Files for bankruptcy*, Bloomberg News, ("ICG Communications, which provides long-distance and internet phone services, said it filed for Chapter 11 protection from its creditors amid management turmoil, slumping sales and tumbling share prices.") **PSINET**—http://www.latimes.com/print/business/20010602/t000045903.html—("Ailing PSINet Files for Bankruptcy Protection," Karen Kaplan, Times Staff Writer, ("PSINet Inc., the first company to offer internet access to consumers, filed for bankruptcy protection Friday") **NorthPoint**—http://news.cnet.com/news/0-1004-202-4501037.html "NorthPoint files for Chapter 11 protection," Bloomberg News; **Rhythms**— http://www.denverpost.com/Stories/0,1002,33%257E32028,00.html—"Rhythms lays off another 400," Kris Hudson, Denver Post, ("Trading of Rhythms' stock – which exceeded $80 two years ago – closed at 43 cents Wednesday, down 9 cents. Many analysts suspect Rhythms will eventually seek bankruptcy protection because potential buyers will hold off to obtain Rhythms' assets for pennies on the dollar under those circumstances. "); **Urban Media**—http://www.news.cnet.com/news/0-1004-200-4605074.html?tag=prntfr—"UrbanMedia cut staff as market retools," Corey Grice, CNET News.com.

### B. The BOCs' Figures Regarding CLEC Building Penetration Are Misstated and Their Related Conclusions Are Misguided

The BOCs inaccurately claim that CLECs have penetrated 25 percent of commercial buildings in the country.[58] USTA assumes in deriving this figure that CLECs have penetrated 175,000 office buildings, but this figure is not accurate because it apparently counts the small percentage of buildings that are open to competition multiple times and includes buildings that are not yet served by CLECs. First, the "Fact Report" fails to determine whether the buildings are actually "on-net," or simply have fiber passing closely by the building.[59] Further, the figure of 175,000 buildings likely includes buildings in which a CLEC has leased from an ILEC or other third party a facility that enters the building, and further likely over-counts buildings by counting each CLEC's on-net building as a separate building even where the CLECs all enter the same building.[60] Moreover, the "Fact Report" undercounts the the total number of "commercial" buildings in the country (denominator) while using an inflated numerator to derive the 25 percent penetration figure. A more accurate reflection of CLEC penetration into buildings is actually less than 6 percent.[61]

The actual cost of building loops or links from a ring to a new customer is not as "manageable" or reasonable as the Joint Petition asserts. In actuality, the average cost per foot of laying fiber varies widely from market to market, but is on average is closer to $30.00 per foot. This is ***six times*** the approximate cost cited by the Joint Petition. Moreover, often a customer is

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[58] Fact Report at 11.

[59] AT&T Reply Comments at 24-25.

[60] AT&T Reply Comments at 24-25 (noting that "it is typical for competitive LECs to consider a building 'on-net' even when it leases the facility that actually enters the building from a third party, usually the incumbent LEC," and that "USTA implicitly assumed that … only one competitor serves a building, because it merely adds together the 'buildings penetrated' for each competitive LEC").

reluctant to wait for a carrier to build out facilities and will choose instead to receive service from the ILEC's existing loops.[62]

Further, although the Joint Petition asserts that CLECs may make targeted investment in fiber networks to address certain large business customers, the Commission correctly determined in the *UNE Remand Order* that there are significant other barriers, including among other things, right-of-way disputes, which prevent CLECs from building their own networks.[63] The Joint Petition's assertion that all carriers, including ILECs, are affected by municipality regulations and restrictions on rights of way is simply unsupported by the basic facts.[64] ILECs are often grandfathered into pre-existing right of way arrangements that municipalities and states do not extend to CLECs. ILECs also often lobby against CLECs' ability to use the rights of way on the same terms and conditions as ILECs. ILECs also have the advantage of having acquired and completed the rights of way necessary to build out their local networks over a span of nearly a hundred years.

Statewide and municipal franchises are one form of significant barrier to entry for CLECs. The RBOCs have tried to have their cake and eat it too on this issue by arguing both sides of this issue. For example, in Missouri, SBC has argued that it has been granted a statewide franchise that exempts it from having to obtain authority from each municipality, from paying franchise fees, and from having to comply with certain terms and conditions imposed by

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[61] AT&T Reply Comments at 26.

[62] XO Declaration at para. 6.

[63] *UNE Remand Order* at para. 186.

[64] Joint Petition at 27.

municipalities.[65] In Missouri's recent 271 proceeding, SBC argued to the PUC that preferential treatment afforded SBC under its statewide franchise is not a barrier to entry or a violation of the federal Telecommunications Act of 1996 even though CLECs would need to obtain authority from each municipality, would be subject to franchise fees and would be subject to other terms and conditions.[66] Moreover, SBC also represented to the Missouri PUC that terms and conditions requested by local governments from CLECs are "unreasonable, [But] [i]t's certainly not a violation of the Telecom Act."[67]

On the other hand, SBC has taken an alternative position where it has been convenient or expedient. For example, SBC recently asked a federal court in Missouri to find that, if SBC is subject to such municipality fees, "consistent with Nextlink's position, [] usage fees are based on gross receipts, and which bear no relationship to the City's cost of managing its rights-of-way, are not 'fair and reasonable compensation,' as that term is used in 47 U.S.C. Sec. 253(c)."[68] SBC similarly argued to other Missouri municipalities that "basing a use fee on a percentage of revenue, without any relationship to the amount of usage itself violates the Telecommunications Act in regards to being fair and reasonable and may be construed as a barrier to entry."[69]

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[65] This issue is not limited to SBC and the State of Missouri. In New York, for example, Verizon makes similar arguments regarding the applicability of municipal franchise authority under its nineteenth century statewide franchise and its ability to escape from paying franchise fees to the City of New York. Such disparate treatment also exists for SBC/Ameritech in Michigan. For example, under a franchise agreement with the City of Troy (in Michigan), the City is seeking $15,000 in right-of-way fees for nine (9) miles of empty conduit recently built by XO. Ameritech, on the other hand, does not pay a penny in franchise fees for its pre-existing high capacity and voice grade circuit network occupying the city's right of way.

[66] TR 2767-8; 2770-1.

[67] *Id*.

[68] *See NEXTLINK Missouri Inc. v. City of Maryland Heights*, Case No. 4:99CV01052 CEJ (Eastern District Court of Missouri ).

[69] Letter dated October 31, 2000 from John Sondag, SWBT, to Steve Rasmussen, City of

In addition, building access may also prevent CLECs from entering or penetrating the local market. In New York, for example, the property manager of a multi-tenant building refused to allow a customer to request service from a CLEC, indicating that the CLEC will be denied access to the building.[70] Similarly, in Washington State, a building owner put out for bidding the provision of telecommunications services to tenants, and the ILEC was able to outbid all other competitive providers by offering to pay the building owner $10,000 every year.[71] In Arizona, when a customer in a building requested expanded service from its CLEC provider, the building owner informed the CLEC that it could not have access to the telephone closet because it was the property of the ILEC;[72] and in Pennsylvania, the building landlord informed tenants of a building that they must change their local telephone company provider to a company that the landlord had selected.[73]

These examples clearly illustrate the difficulties and barriers to entry facing CLECs in the local marketplace today. Further, CLECs and other owners of loop and transport facilities not only lack the ubiquitous networks of the ILECs but also are lacking the back office system relationships that the FCC has compelled the ILECs to establish with competitive carriers. Establishing these ordering, provisioning and maintenance relationships make sense with regard to the ILEC but would be prohibitively expensive and cumbersome to establish among every other CLEC. Consequently, ILEC facilities remain the single available source for ubiquitous

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Maryland Heights. Similarly, by letter dated August 10, 2000 from John Sondag, SWBT, to Mayor and Board of Alderman, City of Riverside, SWBT maintains that "the fees established by Ordinance may be in violation of the Hancock Amendment… and the Federal Telecommunications Act of 1996."

[70] ALTS 2001 Local Competition Report (February 2, 2001), Appendix B.

[71] *Id.*

[72] *Id.*

[73] *Id.*

interconnection and UNEs. Rather than eliminating mandatory access to the high capacity loop and dedicated transport therefore, the Commission must focus on enforcing the rules it has implemented, which are clearly necessary for the preservation and promotion of local competition.

### C. The BOCs' Argument That "Collocation Hotels" and Other Carriers Provide Adequate Non-Incumbent Alternatives for Dedicated Transport Is Insupportable

The Joint Petition's assertion that "collocation hotels" relieve the need for CLECs to collocate in every end office in which they seek to provide transport is also disingenuous.[74] A collocation hotel does not provide a CLEC access to end-users and is generally used as a meet-point for CLECs and interexchange carriers to exchange long distance traffic.[75] The ILECs further often prohibit collocation of transport-only suppliers, even when a CLEC collocates for the purpose of interconnection or access to UNEs and has spare transport capacity.[76] Thus, ILECs make it extremely difficult for CLECs to obtain alternatives to their facilities.

Further, to the extent that the BOCs refer to other collocated companies such as DSL providers as providing potential alternatives for CLECs, such providers are not adequate substitutes for incumbent transport facilities. Where a DSL-only provider is collocated, no transport or special access service can be provided to another carrier. Indeed, DSL providers have no transport to share with or provide to other carriers.[77] Accordingly, BOC attempts to draw connections between collocated carriers and alternative transport facilities are incorrect and

[74] Joint Petition at 27.

[75] XO Declaration at para. 7.

[76] AT&T Reply Comments at 28.

[77] AT&T Reply Comments at 29.

shed no light on the ability of CLECs to obtain high-capacity transport from anyone other than the incumbent.

Similarly, XO has encountered difficulty in obtaining high capacity transport from other carriers. While competitive alternatives for high capacity transport exist, such services are available only on limited point-to-point routes in the largest metropolitan areas.[78] Further, given that various competitive providers have lately fallen into financial troubles, purchase of transport facilities from these providers can sometimes be a risky option.[79]

### D. The Commission Should Not Relieve the ILECs from the Unbundling Requirements When the ILECs Have Yet to Comply with Those Obligations

While the BOCs argue that market conditions have changed in dramatic ways in just six months, it is well known that a CLEC could be forced to wait for six months or longer in order to obtain collocation services from an ILEC. Moreover, the ILECs have failed to comply with basic obligations to provide service that meets certain performance measurements; have failed to comply with merger condition requirements; and now are attempting to evade their basic unbundling obligations. In light of the ILECs' intransigence with regard to these requirements, the Commission should not provide ILECs another opportunity to gain competitive advantages in the local exchange market.

#### 1. Failure to Meet Basic Performance Measures

The BOCs have repeatedly failed to meet performance measures over the past year. For example, SBC in Texas has failed to meet its firm order commitments ("FOCs") to provide LNP only (without loop) for the past four months in the last year and to provide LNP (with loop) for

[78] XO Declaration at para. 9.

[79] XO Declaration at para. 9.

the past six months;[80] failed to provide notices upon order completion within the required 24 hours for the past 12 months;[81] failed to provide reject notices of local service requests within the required timeframe for the past four months;[82] failed to meet the electronic flow-through measures for the past 10 months;[83] and failed to meet measurements on billing completeness in the past 12 months.[84]

Bell Atlantic/Verizon has been no better. In Bell Atlantic's performance monitoring reports, tracking the past 34 months, Bell Atlantic's provisioning of special services and its percentage of missed installation appointments for its wholesale CLEC customers has consistently been worse than the same measure for its retail customers. Further, Bell Atlantic's provisioning of plain old telephone service ("POTS") for its CLEC UNE customers has progressively gotten worse, while its provisioning of that same service to its retail customers has stayed consistently the same: specifically, Bell Atlantic has in less than 30 percent of cases provisioned POTS to its CLEC customers within 5 business days while consistently providing that service to its retail customers in over 90 percent of cases.[85] Similarly, for performance measurements of average interval offered of POTS, maintenance/mean time to repair POTS, meant time to repair special services, and missed appointments/maintenance of POTS, Bell

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[80] *See* SBC Performance Measurement Tracking Reports for Nextlink of Texas (January 2001), Texas Public Utilities Commission, ("SBC Performance Measures") SBC Performance Measure 5d. Provision of LNP Only loops means that SBC is providing LNP while the customer is using XO's loops. Provision of LNP with loops means that SBC provides LNP with SBC's loop.

[81] *See* SBC Performance Measure 5e.

[82] *See* SBC Performance Measure 10.1.

[83] *See* SBC Performance Measure 13. This standard measures the percent of orders from entry through distribution that flows through without manual intervention.

[84] *See* SBC Performance Measure 96.

[85] FCC-Produced Graphs of Data Filed in the BA/NYNEX Merger Performance Monitoring

Atlantic consistently provided the same level or better service to its retail customers while progressively providing worse service to its CLEC customers. [86]

The failure of these ILECs to meet these standard performance measurements illustrates compellingly the difficulty that CLECs face in obtaining necessary elements and service to provide service to their own local end-user customers, and why the Commission should not eliminate unbundled access to the high-capacity and dedicated transport elements.

### 2. Further ILEC Intransigence

As noted above, even in the face of mandatory obligations, the BOCs have failed to comply with Commission requirements; choosing, instead, to pay fines that have become a part of conducting ILEC business. In the context of SBC-Ameritech's failure to meet its merger conditions, for example, on May 2, 2001, SBC paid a fine in the amount of $4.36 million to the United States Treasury. The fine was imposed by the Commission for SBC's continued failures with respect to performance goals set out in the Commission's order approving the merger between SBC and Ameritech.[87] Specifically, the $4.36 million fine was imposed on SBC for "missing targets related to providing competitors with timely wholesale services such as unbundled network elements, failing to meet deadlines for installing services and notifying competitors when their orders where complete."[88]

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Reports for 9/97-6/00 for 14 states. *See* http://www.fcc.gov/ccb/asd/BA_NYNEX/perfMonGraphs.html

[86] FCC-Produced Graphs of Data Filed in the BA/NYNEX Merger Performance Monitoring Reports for 9/97-6/00 for 14 states. *See* http://www.fcc.gov/ccb/asd/BA_NYNEX/perfMonGraphs.html.

[87] *See SBC Pays $4.36 Mln for Performance Failures*, Reuters article (May 2, 2001).

[88] Further, while SBC contends that its payments to the U.S. Treasury have been decreasing, this is because under the performance measurement plan, SBC is allowed to deduct any state penalty payments (which have been increasing) in calculating its federal penalty payments.

SBC disingenuously asserts that because it must comply with millions of performance measurements pursuant to the merger conditions, it has a difficult time meeting the obligations. This argument however is untenable. SBC is well aware of the fact that it negotiated those performance measures and conditions in order to obtain Commission approval of the merger. Regardless of its own involvement in the development of the performance standards, SBC now elects to complain about the requirements to which it previously agreed – safeguards imposed to protect consumers and competition from the merger of two anticompetitive entities. To date, SBC has paid about $27.6 million for missing target dates under the merger conditions. SBC's failures and its treating such fines as simple costs of doing business are most certainly at the heart of Chairman Powell's recent pleas to Congress for authority to increase the fines the Commission may impose against ILECs for compliance failures.[89]

Moreover, recently, a letter was filed with the Commission requesting investigation of the veracity of information supplied by SBC in the proceedings to obtain government approval for long distance service in Oklahoma and Kansas.[90] SBC initially disputed the complaining carrier's claims, but then conceded to the FCC that it had provided inaccurate information. Although it disputed many of complainant's claims, SBC admitted that its system "might not return actual loop makeup information as intended in some circumstances."[91]

Most recently on May 24, 2001, the Commission fined SBC in the amount of $94,500 for failure to meet the Commission's requirements for updating its internet site records with

[89] FCC Press Release, "FCC Chairman Powell Recommends Increased FCC Enforcement Powers for Local Telephone Competition" (May 7, 2001) ("In some cases, [CLECs] may have been stymied by practices of [ILECs] that appear designed to slow the development of local competition.").

[90] *CompTel Wants Tough Sanctions Against SBC on Inaccurate Data*, Telecommunications Reports (May 28, 2001).

information about exhausted collocation space.[92] Further, the Commission recently affirmed an $88,000 fine imposed by the Commission's Enforcement Bureau in March 2001 against SBC Communications, Inc. for violating reporting requirements that the Commission imposed pursuant to its approval of the merger application of SBC and Ameritech Corp.[93]

## VI. THE BOCS' REFERENCES TO FCC ORDERS DEREGULATING BOC FINISHED RETAIL SPECIAL ACCESS SERVICES CONFUSE RETAIL SERVICES WITH WHOLESALE FACILITIES.

The BOC attempt to draw a false correlation between special access retail services and wholesale high-capacity loops and transport. In the Petition, the BOCs state that the Commission has largely deregulated special access pricing in many MSAs based on the same collocation information the BOCs include in the "Fact Report."[94] That comparison is simply wrong.

The Commission's determinations that deregulated the rates for retail special access services utilize an analysis that focuses on the availability of special access services from the eyes of the end-user.[95] In examining alternative providers, that end-user perspective analysis does not distinguish between resellers and facilities-based carriers. From the end-user's point of

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[91] *Id.*

[92] *See Matter of SBC, Inc., Notice of Apparent Liability for Forfeiture*, DA 01-1273, File No. EB-00-IH-0326a, Order of Forfeiture (rel. May 24, 2001); Press Release, "FCC Enforcement Bureau Imposes $94,500 Fine against SBC for Violations of Local Competition Rule" (May 24, 2001).

[93] *See Matter of SBC, Inc., Notice of Apparent Liability for Forfeiture*, FCC 01-184, File No. EB-00-IH-0432, Order of Forfeiture (rel. May 29, 2001).

[94] Joint Petition at 19.

[95] *See In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchase of Switched Access Services Offered by Competitive Local Exchange Carriers, and Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, and 98-157, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206 (rel. Aug. 27, 1999).

view, it does not matter whether the provider is an ILEC or a CLEC reselling ILEC services. While that analysis may be appropriate for deregulating retail services, an examination of the wholesale service market must look at the availability of alternative facilities, not alternative services.[96]

Under the *UNE Remand Order*, an analysis for unbundling requires the Commission to look at the wholesale market for underlying facilities and apply an entirely different set of principles.[97] For example, the analysis employed by the Commission requires an examination of the costs and timeliness of obtaining alternative high-capacity loop and transport sources.[98] Further, the analysis requires a study of the ubiquity and quality of available alternative high-capacity loops and transport.[99] The existence of a reseller of ILEC capacity or facilities does not affect the outcome of the unbundling analysis.[100] Indeed, only truly independent sources of those facilities would be considered, and, as demonstrated throughout the instant comments, the BOCs have not shown changes in the market that would demonstrate viable alternatives to the ILEC high-capacity loops and transport in a manner that would warrant removing high-capacity loops and transport from the UNEs list.

As noted above, the market conditions surrounding high-capacity loops and transport have not changed significantly since the issuance of the *UNE Remand Order*. Accordingly, there is no reason for the Commission to perform a new "necessary and impair" analysis. Such examination would be premature at this juncture.

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[96] *UNE Remand Order* at para. 67.

[97] *UNE Remand Order* at para. 66.

[98] *UNE Remand Order* at paras. 72-89.

[99] *UNE Remand Order* at paras 96-98.

## VII. CONCLUSION

For the foregoing reasons, the Commission should dismiss the Joint Petition.

Respectfully submitted,

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June 11, 2001

[100] *UNE Remand Order* at para. 67.

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of the Local Competition | ) | |
| Provisions of the Telecommunications Act of 1996 | ) | |
| | ) | CC Docket No. 96-98 |
| Joint Petition of BellSouth, SBC, and Verizon for | ) | |
| Elimination of Mandatory Unbundling of High- | ) | |
| Capacity Loops and Dedicated Transport | ) | |
| | ) | |

**DECLARATION OF BRYAN BURNS IN SUPPORT OF COMMENTS OF XO COMMUNICATIONS, INC.**

1. I am Bryan Burns, Director of Voice Services for XO Communications, Inc. ("XO"). I've been employed by XO in various capacities since 1996. My current responsibilities include analysis, development and deployment of new technologies for XO.

2. The Joint Petition asks the Commission to remove two items from the UNE list: high capacity loops and high capacity transport. I find the Joint Petition confusing and misleading because it uses the existence of a pool of suppliers of special access services as evidence that both these unbundled network elements are available from other sources. In this attestation, I am going to discuss high capacity loops separately from high capacity transport because the sources for alternative suppliers of these two elements are very different. In addition, I am going to discuss why the Joint Petitioners heavy reliance on data regarding the special access marketplace is misleading and wrong when extended to the marketplace for local services.

## HIGH CAPACITY LOOPS

3. The Joint Petition defines "high capacity loops" as circuits at a level of DS-1 or higher. Joint Petition at 1, n. 1. In addition, the Joint Petition states "customers of special access and other high-capacity services are overwhelming large businesses located in limited geographic areas". Id. at 11, n. 24. The Joint Petition states that to effectively compete for high capacity customers all a CLEC has to do is make a "targeted investment in fiber networks that address the few commercial buildings housing customers who have a need for high-capacity connections." It appears that the Joint Petitioners would have the Commission believe that high capacity loops, as defined in the petition, are deployed by CLECs like XO only to its largest customers in limited geographic areas. This is patently untrue. The vast majority of XO's customers require loops at the DS-1 level and above.

In fact, small businesses with only 8 to 10 lines are often most economically and efficiently served through the use of a DS-1 circuit. Customers with more than 10 lines are unequivocally purchasers of high capacity services. Consequently, grant of the Joint Petition would impair XO's ability to serve all but residential customers and the smallest commercial enterprises.

4. The Joint Petition's citation of data regarding the concentration of RBOC special access revenues in a limited number of wire centers is very misleading and confusing. Joint Petition at 11. As the Fact Report acknowledges, "the end users of special access service are different from those of basic local exchange service." Fact Report at 2. As the Fact Report also states "[t]he largest purchasers of special access service are interexchange carriers, which use special access to transport large volumes of traffic to and from their largest business customers." The Joint Petition utterly fails to explain how the concentration of revenues from the sale of special access services to long distance companies has any relationship to the availability of high capacity UNE loops for the provision of last mile local services to end user customers by CLECs. Because long distance companies are responsible for the payment of both originating and terminating access to the ILEC, and because they are also responsible for the cost of building and maintaining the facilities required to originate and terminate long distance traffic, it is hardly surprising that long distance carriers have tried to concentrate long distance traffic into a small number of wire centers. Assuming, however, that local end users customers are similarly highly concentrated is a mistake. A better measure of the level of concentration of customers is the number of central offices where the CLEC industry has concentrated its collocation efforts. In any one particular LATA, for example, there may be a number of tandems where the IXCs must be located to pick up traffic. Local carriers, such as XO, however, cannot limit their collocation efforts to the tandems. They must be able to get access to the wire centers where their customer's loops are located.

5. The Joint Petition repeatedly states that there are readily available alternatives to the ILEC local loop from other CLECs, from long distance companies and from wireless providers. This assertion is incorrect. There is no readily available source of high-capacity loops from third-party sources. While it is true that there may be multiple CLECs, including XO, that have deployed fiber rings in large metropolitan areas, these rings are not "last mile" facilities. To reach a particular customer in a particular building each CLEC is still faced with a "build or buy" decision. I find the Joint Petition to be particular confusing and misleading on this point. Without delving into the question of whether the fiber mileage figures cited in the Joint Petition are correct, it is clear that no effort was made to differentiate between intercity fiber facilities, intracity or metro ring fiber facilities and last mile facilities. It is XO's experience that with a few limited exceptions the only way for it to traverse that last mile to a customer's premises is to either build facilities itself or buy a UNE loop from the ILEC.

6. The Joint Petition asserts that "costs of building links from an existing ring to new customers are manageable – approximately $5.25 per foot for trenching and fiber combined, or about $30,000 for a one mile loop." This analysis is laughable. In XO's

experience, the average cost per foot is closer to $30.00 with wide disparities depending upon the city in question. In addition, in claiming that building links is a "manageable" proposition, the Joint Petition fails to account for a customer's reluctance to accept service from a company that will only be able to deliver many months later after construction has been completed. It does not deal with the fact that the expense and delay of the construction of a fiber lateral to a building can rarely be justified to serve a few customers in a building. As should be obvious, XO tries to self-provision loops to its customers as often as possible. Even with self-provisioning as a goal, however, in the vast majority of cases the only cost-efficient and timely alternative to serve a customer is through the purchase of an unbundled loop from the ILEC.

7. The Joint Petition also cites the existence of "collocation hotels" as evidence of the availability of alternatives to a high capacity UNE loop. In XO's experience, collocation hotels are typically used a meet point for CLECs and IXCs for the exchange of long distance traffic. I am not aware of any collocation hotel arrangement that provides XO access to end user customer locations – or loop substitutes -- on other carriers' networks.

## TRANSPORT SERVICES

8. Unlike the availability of high capacity loops, the Joint Petitioners are correct that there is an inventory of transport services available to XO and other CLECs from third party providers. The Joint Petition, however, wildly overstates that degree to which these alternatives are available. For example, Table 6 to the Fact Report lists dozens of cities where wholesale local fiber is presumably available. In that table, the Fact Report lists American Fiber Systems as having fiber networks in 56 cities, including many where XO does business. We checked with the company to see where it has completed facilities. The truth is that American Fiber has only completed construction of one segment of its planned network in one city. That segment is located in Cleveland, Ohio. American Fiber's build out plans for other cities stretches out over the next seven years. Because it includes such highly misleading data, the Fact Report is of little use in determining where high capacity transport alternatives are available.

9. When XO purchases high capacity transport it typically considers whether there is a competitive alternative to the ILEC for the particular route. In my experience, competitive alternatives to ILEC facilities are only available on certain point-to-point routes in the largest metropolitan areas. The vast majority of high capacity services purchased for local traffic are purchased from the ILEC. In addition, during the last 18 months a new consideration has come into play when we consider purchasing transport services for alternative suppliers. Because these transport facilities are often leased for three to five years, XO has to take into account the financial health of the alternative provider and whether it likely has the wherewithal to remain in business during the lease term.

10. Again, the Joint Petition is misleading and confusing in discussing transport issues because it fails to distinguish between intercity long haul facilities, and short-haul

facilities used for local traffic. The marketplace for intercity long haul services is much more competitive than its local counterpart. This evidence is not helpful in looking at a CLEC's need to obtain short-haul transport in the local marketplace.

11. Even where other carriers have local fiber available, often the fiber is located along the same routes as XO's rings or is deployed only in a very limited area. For example, the Fact Report cites Northeast Optic Network ("NEON") as a wholesale fiber supplier in Washington, D.C. What the report does not indicate is the size of the NEON ring in that city. In fact, NEON has a fiber ring that circles only about 22 blocks of the Washington, D.C. market, all located north of the White House. XO is serving customers throughout the metropolitan area, Northern Virginia and Montgomery County, MD. NEON would only be an alternative source of transport for us for a specific point-to-point route. In addition, CLECs and wholesale fiber providers often find that they have fiber located along the same routes. This frequently occurs because municipalities require joint construction in a single trench. The Joint Petitioners have not taken this lack of diversity into account when they claim that there are alternatives for high capacity transport.

**I declare under penalty of perjury that the foregoing is true and correct. Executed on this 11th day of June 2001.**

/s/

**Bryan Burns**
**Director, Voice Services**
**XO Communications, Inc.**

## CERTIFICATE OF SERVICE

I, Jane Whang, hereby certify that on June 11, 2001, I caused the "Comments of XO Communications, Inc.," and the attached "Declaration of Bryan Burns in Support of Comments of XO Communications, Inc." to be served by using the Commission's Electronic Comment Filing System ("ECFS") in this proceeding.

/s/
Jane Whang